95-1226

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In The

Supreme Court of the United States

October Term, 1995

FRANK J. KELLEY, Attorney General of the State of Michigan; THE OKLAHOMA CORPORATION COMMISSION; THE MONTANA PUBLIC SERVICE COMMISSION; COALITION AGAINST FEDERAL PREEMPTION OF STATE MOTOR CARRIER REGULATION; THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS; CARLA STOVALL, Attorney General of the State of Kansas; and THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,

Petitioners,

vs.

THE UNITED STATES OF AMERICA, ex rel. the Department of Justice; and JANET RENO Attorney General of the United States,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF *AMICUS CURIAE* OF UNITED PARCEL SERVICE, INC., IN SUPPORT OF RESPONDENTS

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

United Parcel Service, Inc., as *amicus curiae*, submits this brief in support of the brief in opposition filed by the Respondents, the United States of America, *ex. rel.* the Department of Justice and Janet Reno, Attorney General of the United States. UPS urges that Section 601 of Title VI of the Federal Aviation Administration Authorization Act of 1994, which became effective on January 1, 1995, be upheld as a valid exercise of Congress' commerce power.

INTEREST OF THE *AMICUS CURIAE*

United Parcel Service, Inc., (hereinafter "UPS") has authority to conduct intrastate operations in all fifty states, including authority issued by Petitioners Oklahoma Corporation Commission and Montana Public Service Commission. UPS is a wholly owned subsidiary of United Parcel Service of America, which also owns United Parcel Service Co., a certificated air carrier under Subchapter IV of the Federal Aviation Act of 1948 (49 U.S.C. §1371, as amended). Under the Federal Aviation Administration Authorization Act of 1994 (Pub. L. No. 103-305, Title VI, 108 Stat. 1604, codified, as amended, at 49 U.S.C. §14501) (hereinafter "Section 601") the states (except Hawaii), as of January 1, 1995, have been preempted from enacting or enforcing any law or regulation related to UPS's prices, routes or services.

SUMMARY OF ARGUMENT

Petitioners have requested a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit (*Kelley v. U.S.*, 69 F.3d 1503 (10th Cir. 1995) alleging Section 601: (1) violates the Tenth Amendment of the U.S. Constitution in that it compels state governments not to take legislative action, fails to offer states incentives not to enact legislation, and fails to provide a comprehensive federal scheme to replace state regulations; (2) violates the Commerce Clause of the Constitution in that no rational basis existed for Congress' actions and the means chosen were not reasonably adapted to constitutional ends; and, (3) violates the Guarantee Clause of the Constitution in that state officials are no longer accountable to their electorate. UPS submits this brief *amicus curiae* to assist the Court in considering select Commerce Clause and Tenth Amendment arguments. No argument is advanced in response to Petitioners' Guarantee Clause claims.

Inquiries under the Commerce Clause and the Tenth Amendment are mirror images in cases involving the division of authority between federal and state governments. *New York v. United States*, 402 U.S. 144, 156, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992). Thus, "even if [Petitioners] are correct in their assertions that §601 intrudes upon a domain traditionally left to the states, it is constitutional as long as it falls within the commerce power." *Kelley v. U.S.*, *supra*, at 1509; *Gregory v. Ashcroft*, 501

U.S. 452, 460, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991); *United States v. Lopez*, ___ U.S. ___, 115 S. Ct. 1624, 1630, 131 L. Ed. 2d 626 (1995)). The central issue, then, is whether Congress acted within its Commerce Clause power when it enacted Section 601. Under *United States v. Lopez* and other precedent of the Court, no room for doubt exists: Section 601 must be upheld as a proper exercise of Congress' commerce power. The Writ should not issue.

REVIEW BY THE COURT IS NOT WARRANTED

The early history of the Court developed from matters affecting interstate commerce, the subject now before the Court. The issue was of great importance to the founding fathers, and illustrates the critical interplay between the national government and the rights of the several states. "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence, a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51, at 323 (Clinton Rossiter ed., 1961) (J. Madison). The decisions of the Court have shown the necessary analysis to be dynamic, respectful of the rights of the states, and sensitive to the predominant need for stability in matters of interstate commerce. *See, e.g., Gibbons v.*

Ogden, 9 Wheat 1, 189-190, 6 L. Ed 23 (1824); *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942); *compare National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976) *with Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985). By denying the Petition for Writ of Certiorari, the Court will affirm these principles of federalism in the economic environment of today.

Petitioners suggest that Congress' exercise of its Commerce Clause power in enacting Section 601 presents a matter of first impression in that Congress preempted state regulation of intrastate motor carriers while preserving an inexplicably inconsistent set of rules for interstate carriers.[1] Petition for Writ of Certiorari (hereinafter "Petition"), at 6. This proffer is illusory. In this instance, Congress knowingly chose to preempt and not to regulate. No constitutional implications arise as a result. "Congress has the power to keep silent. Congress can regulate interstate commerce just by not doing anything about it." Powell, T. R., *The Still Small Voice of the Commerce Clause*, Selected Essays on Constitutional Law, 3 A.A.L.S. 931, 932 (1938). The decisions of the Court support Congress' affirmative silence.

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[1] In fact, a review of federal regulation of interstate carriers during recent years discloses no meaningful control of "rates, routes and services" by the Interstate Commerce Commission. With the ICC Termination Act of 1995, any "inexplicable disparity" between the regulation of interstate and intrastate carriers effectively evaporates.

A. Section 601 Does Not Exceed Congress' Authority Under The Commerce Clause.

In determining whether sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the states, the inquiry can be one of whether an Act of Congress is authorized by one of the powers delegated to Congress in Article 1 of the Constitution (*Perez v. United States*, 402 US 146, 91 S. Ct. 1357, 28 L. Ed 2d 686 (1971)) or whether it invades the province of state sovereignty reserved by the Tenth Amendment (*Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985)). UPS respectfully submits that the most logical and informative analysis is one that looks first at the scope of Congress' power under the Commerce Clause and then to whether the exercise of that power offends the prerogatives of the several states by "overstep[ping] the boundary between federal and state authority." *New York v. U.S.*, 505 U.S. 144, 159, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992).

Petitioners argue that under the two-part test of *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.* (452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed. 2d 1, (1981)), Section 601 fails to pass constitutional muster. Petition at 5. Under this test, if Congress finds that a regulated activity substantially affects interstate commerce, the Court must defer to Congress if there is any rational basis for such a finding. This established, the only

remaining question for judicial inquiry is whether the means chosen by Congress are reasonably adapted to the end permitted by the Constitution. *Hodel*, supra, 452 U.S. at 276. Section 601 survives inquiry under both parts of the test.

1. A Rational Basis Exists For Congress' Finding Of A Substantial Effect On Interstate Commerce.

Petitioners argue that the lower courts abdicated their responsibilities to review the basis of Congress' action by failing to carefully conduct an independent examination of the scope and effect of Section 601. Petition at 16. Petitioners are incorrect. In fact, they attempt to obscure the probative factual inquiry that occurred at both the trial and appellate levels in order to obtain a level of review not heretofore found to be appropriate by this or any federal court.

In *United States v. Lopez*, the Court announced that in instances when Congress seeks, under its commerce power, to regulate activities related to interstate commerce, the analysis to be conducted is whether the regulated activity "substantially affects" interstate commerce. ___ U.S. ___(638), 115 S. Ct. 1624, 1630, 131 L. Ed. 2d 626, 637 (1995). Even though the Court in *Lopez* noted that Congress need not make particularized findings in order to legislate (115 S. Ct. at 1631, citing *Katzenbach v. McClung*, 379 U.S. 294, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964)), legislative findings and congressional committee findings regarding effect on

interstate commerce can be considered (*Lopez*, *supra*, 115 S. Ct. at 1631) and indeed weigh heavily in the analysis to be conducted. *See*, *Perez v. United States*, 402 US 146, 155, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971) (the findings by Congress were found to be "quite adequate"). Upon review, the Court will rapidly determine that the findings of Congress in enacting Section 601 were thorough, knowledgeable, and more than adequate. *See*, *FERC v. Mississippi*, 462 U.S. 742, 759, 102 S.Ct. 2126, 72 L.Ed. 2d 532 (1982). A deeper, independent examination into the breadth and scope of Section 601 that Petitioners suggest is not required for a constitutional imprimatur on Congress' action.[2]

Lopez is instructive to the Court's inquiry: "The history of the judicial struggle to interpret the Commerce Clause during the transition from the economic system the Founders knew to the single, national market still emergent in our era counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power." *Lopez*, *supra*, 115 S. Ct. at 1634 (Kennedy, J., concurring). Commerce among the

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[2] The significance Petitioners attach to the language in the Tenth Circuit's decision to the effect that "there are undoubtedly various state regulations that effect and pertain only to purely intrastate motor carrier activities" (*Kelley v. U.S.*, 69 F.3d 1503, 1508 (10th Cir. 1995)) is in fact of no consequence. The Court has found that "where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *U. S. v. Lopez*, ___ U.S. ___, ___, 115 S. Ct. 1624, 1629, 131 L. Ed. 2d 626 (1995) (citing *Maryland v. Wirtz*, 392 U.S. 183, 196, n. 27, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968)).

states is not a technical conception, but a practical one, drawn from the course of business (*Lopez*, *supra*, 115 S. Ct. at 1636 (Kennedy, J., concurring) citing *Swift & Co. v. United States*, 196 U.S. 375, 25 S. Ct. 276, 49 L.Ed. 518 (1905)).

The legislative history of Section 601 is replete with examples of the practical considerations, *drawn from the course of business*, upon which Congress based its decision to preempt state regulation. Congress found that continued state economic regulation of motor carrier operations would cause significant inefficiencies, increased costs, reduction of competition and inhibition of innovation and technology, and would curtail the expansion of markets. H.R. Conf. Rpt. No. 677, 103rd Cong., 2nd Sess. (1994), *reprinted in* 1994 U.S.C.C.A.N. at 1759. Department of Transportation estimates found that preemption of state economic regulation could eventually yield $3 to $8 billion per year in savings, with other estimates placing the savings as high as $5 to $12 billion. *Id.* Congress recognized that the sheer diversity of various state regulatory schemes was a huge problem for national and regional carriers attempting to conduct the standard way of doing business. *Id.* The lower court noted that in hearings on Section 601, numerous examples were cited illustrating that rates for shipments within a state exceeded rates for comparable distances across state lines. Decision of the U.S. District Court, Western District of Oklahoma, December 30, 1994 (Appendix B to Petition at 39-40). The specific example of the

small package express business, like UPS, in which companies frequently shipped goods across state lines and back into the state of origin to avoid the higher rates for purely intrastate shipments was given. *Id.* Congress found that the lifting of these antiquated controls would permit transportation companies to freely compete more efficiently, to provide quality service to their customers, and to have service options dictated by the marketplace and not by an artificial regulatory structure. H.R. Conf. Rpt. No. 677, *supra*, at 1760.

These findings are not only detailed, but constitutionally sufficient and consistent with *stare decisis*. As the Court found in *New York*, the framework of the Constitution

> has been sufficiently flexible over the past two centuries to allow for enormous changes in the nature of government. The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that *any* government would conduct such activities; and second, because the Framers would not have believed that the *Federal* Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role. *New York*, *supra*, 505 U.S. at 157 (emphasis in original).

Congress' action in this instance exhibits nothing more than the prudent expansion of interstate commerce regulation within proper constitutional parameters. Petitioners assert that Section

601 has weakened the concept of Federalism embodied in the Constitution. Petition at 19. Precisely the opposite is the case. A valid exercise of the commerce power enhances the viability of the nation and the several states.

2. The Means Chosen By Congress Bear A Rational Relationship To Constitutionally Permitted Ends.

Once Congress determines that an activity substantially affects interstate commerce, the only remaining inquiry is whether the means chosen by Congress are reasonably adapted to a constitutional end. *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.* (452 U.S. 264, 276, 101 S.Ct. 2352, 69 L.Ed. 2d 1 (1981). Petitioners claim that because of the "blunderbuss" impact of Section 601 (Petition at 23), Congress acted irrationally in choosing preemption. An analysis of the record leads to the contrary conclusion: Congress' use of its Supremacy Clause powers was reasonably related to the goals Congress sought to accomplish.

Section 601 strikes an appropriate balance between the concerns of the citizens of the sovereign states and an exercise of federal power. Congress explicitly found that the need for Section 601 arose from a "patchwork of regulation" by the states. H.R. Conf. Rpt. No. 677, 103rd Cong., 2nd Sess. (1994), *reprinted in* 1994 U.S.C.C.A.N. at 1759. Preemption is one of the more rational means at Congress' disposal when divergent regulatory

schemes of the rates, routes and services of motor carriers stand as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 204, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983). Congress properly found that preemption legislation was in the public interest as well as necessary to facilitate interstate commerce. H.R. Conf. Rpt. No. 677, *supra*, at 1759. The Court ought not to disturb this finding.

Through Section 601, Congress properly addresses economic activity of intrastate transportation by motor carrier, an area often found subject to federal regulation (*Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964) *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942)) and not regarded as a matter of state concern.[3] Nonetheless, Congress was sensitive to state concerns that did not bear on the economic aspects of interstate commerce and in no way encroached upon them. For example, Congress left to the states the ability to regulate safety, to determine financial responsibility relating to insurance (H.R. Conf. Rpt. No. 677, *supra*, at 1756), and to require documentation evidencing carrier

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[3] Petitioners assert that "the regulation of intrastate truck transportation has always been regarded as a matter of state concern." Petition at 19, n. 18. This argument is circular. The fact that some states may have imposed regulations has no bearing on whether the matters regulated are of peculiar and significant state concern.

compliance with state safety standards. H.R. Conf. Rpt. No. 677, *supra*, at 1757. While "the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist" (*McCulloch v. Maryland*, 4 Wheat 316, 405, 4 L. Ed. 579 (1819), this case does not command any different answer to that question than previously articulated by the Court.

B. Section 601 Does Not Violate The Tenth Amendment Of The United States Constitution

Petitioners' lengthy discussion of *New York v. United States* ignores the fundamental difference between *New York* and the matter now before the Court. Specifically, Section 601 is preemptive legislation, which divests the states of the power to regulate in an area of activity wherein the authority of Congress is paramount, to wit, transportation affecting interstate commerce. *New York* and its progeny, by contrast, involve instances in which Congress elected not to preempt state activity, but rather attempted to compel the states to act affirmatively by promulgating and enforcing laws and regulations in furtherance of federal policy. The distinction is critical and dispositive.

The powers of Congress to preemptively bar the states from regulating (as opposed to mandating the states to regulate), have repeatedly been affirmed by the Court. *See, New York, supra*, 505 U.S. at 2420 (under the Supremacy Clause, Congress

could, if it wished, preempt state radioactive waste regulation) *and FERC v. Mississippi*, 462 U.S. 742, 759, 102 S.Ct. 2126, 72 L.Ed. 2d 532 (1982) (Congress' exemption of qualified power facilities from state regulation does nothing more than preempt conflicting state enactments in the traditional way).

That Congress may replace state regulation with the "free play of economic forces" is not subject to question. *Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976); *NLRB v. Nash-Finch Co.* 404 U. S. 138, 144, 92 S. Ct. 373, 30 L. Ed. 2d 328 (1971). Section 601 on its face preempts state law. The Court has construed preemption to preclude "a State from regulating within a protected zone, whether it be a zone protected and reserved for market freedom ... or for ... [continued Federal] jurisdiction." *Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts*, 507 U.S. 218, 226-7, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993) (emphasis added).

Petitioners insist that the failure of Congress to replace intrastate regulation with federal standards, provide for federal agencies to oversee the intrastate motor transportation of property, or carefully craft a uniform national regulatory scheme results in

infirm legislation. Petition at 9-10. The intimated unconstitutional "black hole" simply does not materialize.[4]

Congress' election not to occupy the field with federal regulation is consistent with the Court's broad construction of Congress' commerce power, respectful of the Tenth Amendment, and deferential to the framers of the Constitution. Congress found that continued intrastate regulation was "a huge problem for national and regional carriers attempting to conduct the standard way of doing business" and a "[l]ifting of these antiquated controls will permit our transportation companies to freely compete more efficiently and provide quality service to their customers." H.R. Conf. Rpt. No. 677, *supra*, at 1760. Congress was keenly aware that transportation, which by its very definition is dynamic and not static, has developed to the point where continued distinctions between "intrastate" and "interstate" impaired the development of a uniform system of commerce.

The Court has been equally cognizant. "As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have

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[4] Petitioners' position that Congress' continued regulation of interstate truck regulation reflects a continued judgment that regulation of interstate truck transportation remains vital (Petition at 12) is misplaced. It should be noted that the ICC Termination Act itself recodified the preemption provision of Section 601, thus clearly reflecting Congress' continuing intent to preempt state regulation. ICC Termination Act of 1995, Pub. L. No. 104-88. *See also*, note 1, *supra*, at 4.

accordingly come within the scope of Congress' commerce power." *New York*, *supra*, 505 U.S. at 158. To find Section 601 an invalid exercise of Congress' commerce power would, in the words of Justice Kennedy, damage both "the Court as an institution and the legal system as a whole [which] have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point." *Lopez*, *supra*, 115 S. Ct. at 1637 (Kennedy, J., dissenting).[5]

Specific to the area of transportation, the courts have recently held that Congress has the right to preempt state regulation and replace it with nothing if it so desires. *Federal Express Corporation v. Public Utilities Commission* (936 F.2d 1075, 1079, (9th Cir. 1991), *cert. denied*, 112 S.Ct. 2956 (1992). That case, to which the genesis of Section 601 can be traced (H.R. Conf. Rpt. No. 677, *supra*, at 1759), confirms that a state may properly be preempted from regulating intrastate motor carrier rates, routes and services, even in areas over which Congress elected not to impose specific economic rules. In addition, the Airline Deregulation Act, which Petitioners have not challenged as a valid exercise of Congress' preemptive powers, is identical to Section 601 in its

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[5] Petitioners invite damage to the Court as an institution and to the separation of powers of the three branches of government. As this Court stated in *South Carolina v. Baker*, "[n]othing in *Garcia* or the Tenth Amendment authorizes courts to second-guess the substantive basis for congressional legislation." 485 U.S. 505, 513, 108 S. Ct. 1355, 99 L. 2d. 2d 592 (1988).

method of prohibiting states from enacting or enforcing laws, regulations or provisions related to "price, route, or service." 49 U.S.C. Section 41713, formerly 49 U.S.C. Section 1305(a). As to Section 601, Congress speaks clearly to the subject: "The central purpose of this legislation is to extend to all affected carriers. . .the identical intrastate preemption of prices, routes and services as that originally contained in Section 105(a), 49 U.S.C. App. 1305(a)(1), of the Federal Aviation Act." H.R. Conf. Rpt. No. 677, *supra*, at 1755.

Finally, in enacting Section 601, Congress has not regulated the states *as states* as Petitioners allege. Petition at 11. The same argument was raised and rejected in *Hodel v. Virginia Surface Mining and Reclamation Association*. There, the aggrieved coal producers and state governments urged that the federal usurpation of their regulatory roles coerced the states, regulated the states as states and impinged upon the states' freedom to make decisions in areas of "integral governmental functions." 452 U.S. 264, 289, 101 S.Ct. 2352, 69 L.Ed. 2d 1 (1981). In response, the Court held that although congressional enactments such as the Surface Mining Control and Reclamation Act "obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result." *Hodel*, *supra*, 452 U.S. at 290. In *Hodel*, the Court found that "Congress could constitutionally have enacted a statute prohibiting any state

regulation of surface coal mining" (*Id.*, emphasis added) without invading areas reserved to the states by the Tenth Amendment. The Court should reach the same conclusion here.

CONCLUSION

Section 601 represents a proper exercise of Congress' commerce power that does not invade an area reserved to the states by the Tenth Amendment. Congress, in articulate and reasoned findings, made the determination that continued intrastate economic regulation of transportation by motor carrier had a substantial and debilitating effect on interstate commerce. Congress chose to preempt the field, a rational and appropriate means at its disposal to reach a permitted constitutional end. These actions do not offend any precedent of the Court and are consistent with the Constitution.

Respectfully submitted,

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APPENDIX A

WRITTEN CONSENTS TO FILING

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March 12, 1996

Via Facsimile and First Class Mail

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Re: Kelley v. United States, Petition for Writ of Certiorari, Supreme Court No. 95-1226

Dear Mr. Poole:

In response to your letter dated March 6, 1996 and in accordance with Supreme Court rule 37, the International Brotherhood of Teamsters hereby consents to United Parcel Service filing an amicus curiae brief in the above-referenced proceeding.

If you have any questions regarding the above please contact me at the above-referenced number.

Sincerely,

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March 18, 1996

RECEIVED MAR 22, 1996, ANDERSON, DONOVAN & POOLE

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Re: *Kelley, et al.* v. *United States, et al.*,
United States Supreme Court
No. 95-1226

Dear Mr. Poole:

I wish to confirm our telephone conversation of Thursday, March 14, 1996, in which I indicated consent to the filing of an *amicus curiae* brief by United Parcel Service, Inc. on behalf of the Respondents in the above-referenced case, presently pending on Petition for Writ of Certiorari before the United States Supreme Court. I indicated consent on behalf of the Coalition Against Federal Preemption of State Motor Carrier Regulation, Attorney General of Michigan Frank J. Kelley, the Oklahoma Corporation Commission, Attorney General of Kansas Carla Stovall, and the Kansas Corporation Commission. It is my understanding that you have previously been given consent by Petitioners Montana

Public Service Commission and the International Brotherhood of Teamsters in separate correspondence.

Please advise if there are any questions.

Very truly yours,

ROBERT E. McFARLAND

Robert E. McFarland

REM/lj

cc: Mr. Kelly G. Keenan
Mr. Lawrence R. Edmison
Mr. Martin Jacobson
Mr. W. Robert Alderson
Mr. Marc J. Fink
Mr. Richard C. Labarthe
Mr. Peter Maier

PUBLIC SERVICE COMMISSION
STATE OF MONTANA

Nancy McCaffree, Chair
Dave Fisher, Vice Chair
Bob Anderson
Danny Oberg
Bob Rowe

[SEAL]

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RECEIVED MAR 11
1996 ANDERSON,
DONOVAN & POOLE

March 7, 1996

Edward G. Poole
Anderson, Donovan, and Poole
601 California St., Suite 1300
San Francisco, CA 94108-2818

Dear Mr. Poole:

In response to your March 6, 1996 request regarding *Kelley v. U.S.*, U.S. Supreme Ct. No. 951226, the Montana Public Service Commission consent to your client's, United Parcel Service, Inc., filing of a brief *amicus curiae* in support of the Department of Justice.

Sincerely,

MARTIN JACOBSON

Martin Jacobson
Staff Attorney

MJ/dlp

[SEAL]

U.S. Department of Justice
Office of the Solicitor General
Washington, D.C. 20530

March 25, 1996

Edward G. Poole
Law Offices of Anderson,
Donovan & Poole
601 California Street
Suite 1300
San Francisco, CA 94108

Re: Kelley v. United States
No. 95-1226

Dear Mr. Poole:

As requested in your letter of March 6, 1996, I hereby consent to the filing of a brief *amicus curiae* on behalf of the United Parcel Service, Inc., in support of the respondent in the above-styled case.

Sincerely,

DREW S. DAYS, III

Drew S. Days, III
Solicitor General

cc: William K. Suter, Esquire
Clerk
Supreme Court of the United States
Washington, D.C. 205431